THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1996 CUMULATIVE SUPPLEMENT

Volume 12

Chapters 75 through 89F

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

D. S. Tussey, K. S. Mawyer, R. B. Layne,
K. J. Kennedy and F. J. Payne

Annotated through 470 S.E.2d 425. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

MICHIE
Law Publishers
Charlottesville, Virginia
1996

COPYRIGHT © 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996
BY
MICHIE,
A DIVISION OF REED ELSEVIER INC.
AND REED ELSEVIER PROPERTIES INC.

All rights reserved.

5165114

"Michie" and the Open Book and Gavel logo are trademarks of
Michie, a division of Reed Elsevier Inc.

Preface

This Cumulative Supplement to Volume 12 contains the general laws of a permanent nature enacted by the General Assembly through the 1996 Second Extra Session, which are within the scope of such volume, and brings to date the annotations included therein.

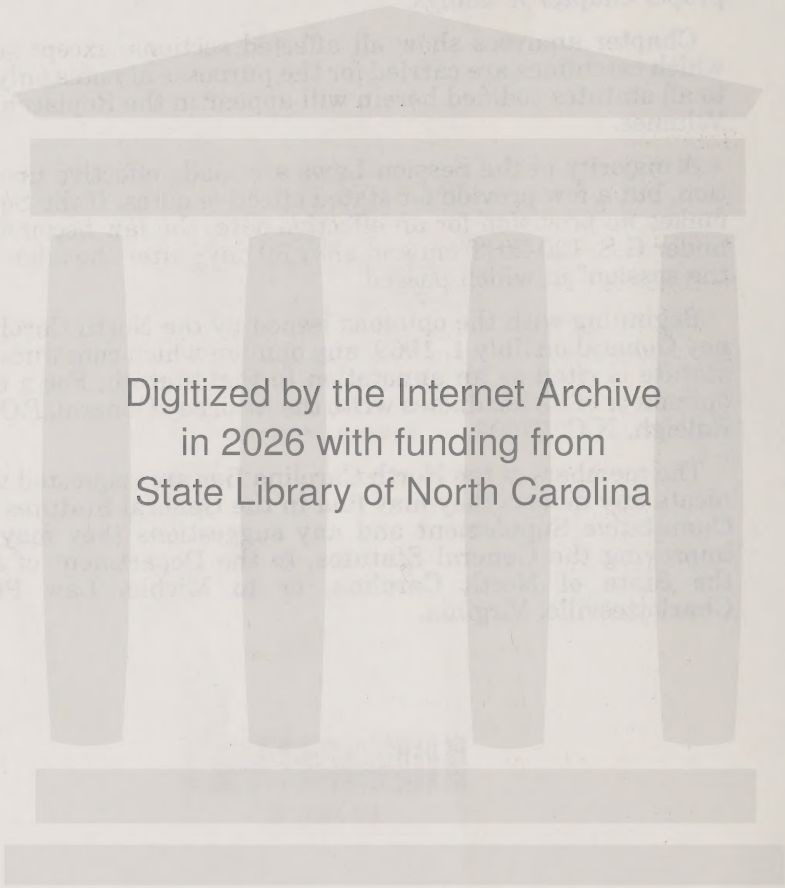
Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.



Digitized by the Internet Archive
in 2026 with funding from
State Library of North Carolina

https://archive.org/details/generalstatuteso12nort_5

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1996 Second Extra Session affecting Chapters 75 through 89F of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 343, p. 303.
North Carolina Court of Appeals Reports through Volume 121, p. 513.
South Eastern Reporter 2nd Series through Volume 470, p. 425.
Federal Reporter 3rd Series through Volume 83, p. 1423.
Federal Supplement through Volume 924, p. 224.
Federal Rules Decisions through Volume 165, p. 700.
Bankruptcy Reports through Volume 195, p. 823.
Supreme Court Reporter through Volume 116, p. 1711.
North Carolina Law Review through Volume 74, p. 1319.
Wake Forest Law Review through Volume 30, p. 1008.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

The General Statutes of North Carolina
1996 Cumulative Supplement

VOLUME 12

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

Sec.
75-2.1. Monopolizing and attempting to monopolize prohibited.
75-5 through 75-7. [Repealed.]

Article 3.

Motor Fuel Marketing Act.

Sec.
75-81. Definitions.

Article 1.

General Provisions.

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

CASE NOTES

I. General Consideration.
II. Trade or Commerce.
III. Unfair and Deceptive Acts.
  A. In General.
  B. Illustrative Cases.
IV. Pleading and Practice.

I. GENERAL CONSIDERATION.

To establish a prima facie claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995).

Three-Pronged Test. — In order to establish a violation of this section, a plaintiff must meet a three-pronged test: there must be a showing of an unfair or deceptive act or practice, or an unfair method of competition; in or affecting commerce; and proximately causing actual injury to the plaintiff. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

As an agency of the State, a city may not be sued under Chapter 75. Rea Constr. Co. v. City of Charlotte, 121 N.C. App. 369, 465 S.E.2d 342 (1996).

Rental of residential property including a house and a trailer space was "in or affecting commerce" for the purposes of liability under this section for unfair or deceptive trade practices. Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995).

Sale of Personal Residence. — In order to avoid liability under this section, a defendant must fit under one of the statutory exemptions or the "homeowner's exemption" for a private homeowner selling his or her personal

residence recognized by the Court of Appeals. Stolfo v. Kernodle, 118 N.C. App. 580, 455 S.E.2d 869 (1995).

Who Are Protected. —

The private homeowner's exemption continues to exist. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

Applied in Ace Chem. Corp. v. DSI Transps., Inc., 115 N.C. App. 237, 446 S.E.2d 100 (1994); Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995); Carolina Water Serv., Inc. v. Town of Atlantic Beach, 121 N.C. App. 23, 464 S.E.2d 317 (1995).

Cited in Martin Marietta Corp. v. Wake Stone Corp., 339 N.C. 602, 453 S.E.2d 146 (1995); McNeil-PPC, Inc. v. Granutec, Inc., 919 F. Supp. 198 (E.D.N.C. 1995).

II. TRADE OR COMMERCE.

The federal Copyright Act preempts any legal or equitable right under state law which is "equivalent" to any of the exclusive rights within the general scope of copyright, so that state law could not in fact make copyright infringement a violation of this act. Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

Referral Fee. — Although persons selling their own private residence are exempt from Chapter 75 liability, where defendant's wife received a referral fee, defendants' transaction was within the scope of this section. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

"Unfair" and "Deceptive" Practices. —

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers; an act or practice is deceptive if it has the capacity or tendency to deceive. Jacobs v. Central Transp., Inc., 891 F. Supp. 1088 (E.D.N.C. 1995).

Claims for unfair and deceptive trade practices are not assignable. Horton v. New S. Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856 (1996), cert. denied, — N.C. —, 472 S.E.2d 8 (1996).

Failure to Disclose Unenforceable Lien. — The failure of the seller of a boat to disclose the existence of a lien on the boat of which the seller had knowledge at the time but correctly believed to be invalid and unenforceable, constituted a violation of the act. Standing v. Midgett, 850 F. Supp. 396 (E.D.N.C. 1993).

Factors Determining Unfairness or Deception. —

Under North Carolina law, in order for North Carolina's Unfair and Deceptive Trade Practice Act, § 75-1.1, to apply, there must be a substantial relationship to the particular conduct giving rise to the unfair and deceptive trade practices claim. Jacobs v. Central Transp., Inc., 891 F. Supp. 1088 (E.D.N.C. 1995).

Fraud, Bad Faith and Intentional Misrepresentations Not Required. — Whether an act or practice is unfair or deceptive is to be determined by all the facts and circumstances surrounding the transaction; a plaintiff under this section is not required to show fraud, bad faith or intentional misrepresentation. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

Breach of Contract. —

Mere breach of contract is not an unfair or deceptive trade practice. Jacobs v. Central Transp., Inc., 891 F. Supp. 1088 (E.D.N.C. 1995).

North Carolina does not recognize a cause of action against the insurance company of an adverse party based on unfair and deceptive trade practices under this section. Wilson v. Wilson, 121 N.C. App. 662, 468 S.E.2d 495 (1996).

A private right of action under this section and § 58-63.15 may not be asserted by a third-party claimant against the insurer of an adverse party. Wilson v. Wilson, 121 N.C. App. 662, 468 S.E.2d 495 (1996).

B. Illustrative Cases.

Claims Not Preempted by Interstate Commerce Act. — State-law claims are not preempted by the Interstate Commerce Commission (ICC) regulatory scheme unless the state claim is based on a conflicting provision of law; thus, plaintiffs' claims for unfair and deceptive trade practices were not preempted by the Interstate Commerce Act. Jacobs v. Central Transp., Inc., 891 F. Supp. 1088 (E.D.N.C. 1995).

Allegation of Misrepresentation Sufficient to Maintain Claim. — Claim in complaint that defendant con-

tinuously misrepresented its position, by leading the plaintiff to believe the defendant was guarantor on note, and held all the rights and obligations associated with being a guarantor, was sufficiently stated to survive a motion to dismiss. A.C. Monk & Co. v. UBAF Arab American Bank, 875 F. Supp. 311 (E.D.N.C. 1995).

Automobile Sales. —

Where defendant, by its employee, made statements to the plaintiff that led the plaintiff to believe auto had not been wrecked, these statements were material to the parties' transaction and mislead the plaintiff into purchasing the auto, and were an unfair trade practice. Torrance v. AS & L Motors, Ltd., 119 N.C. App. 552, 459 S.E.2d 67 (1995).

Failure to Maintain Dwellings. — Where plaintiff failed to maintain dwellings in a safe, fit, and habitable condition and subsequently made demands for payment of rent, his actions constituted an unfair and deceptive trade practice. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Damages Award Justified. —

The court's entry of judgments against manufacturer for treble damages on claim under this section and against seller for breach of implied warranty combined with the order that manufacturer fully indemnify seller allowed plaintiff double recovery. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Conduct Not Amounting to Unfair Trade Practice. —

In action instituted by boatyard claiming a maritime lien on defendant vessel, where defendants alleged as their second counterclaim that plaintiff engaged in a practice where it would "lure" boat owners into its marina and charge excessively for services rendered, and if those owners refused to pay the bill, plaintiff would threaten seizure and sale of the vessel, defendants failed to show the existence of an act or practice concerning plaintiff's business policies that rose to the appellation "unfair" or "deceptive"; the "threats" of claiming a maritime lien or "papering" any vessel are exercises of valid rights of the plaintiff to assure payment for any services actually performed. Marlen C. Robb & Son Boatyard & Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526 (E.D.N.C. 1994).

IV. PLEADING AND PRACTICE.

Trebling of Damages. —

Once a plaintiff has established the right to recover under this section, the award of treble damages pursuant to § 75-16 is automatic and not discretionary. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

§ 75-2.1. Monopolizing and attempting to monopolize prohibited.

It is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina. (1995 (Reg. Sess., 1996), c. 550, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 550, s. 4 made this section effective October 1, 1996, and applicable to civil actions filed on or after that date.

§ 75-4. Contracts to be in writing.

CASE NOTES

This section does not support the proposition that any limitation on the right to do business must be in writing. York v. Golden Poultry Co., 883 F. Supp. 32 (E.D.N.C. 1995).

§§ 75-5 through 75-7: Repealed by Session Laws 1995 (Regular Session, 1996), c. 550, s. 2, effective October 1, 1996.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 550, s. 3, provides in part that the repeal of G.S. 75-5 is not intended to render conduct lawful that violates the provisions of any other section of Chapter 75 of the General Statutes.

§ 75-8. Continuous violations separate offenses.

CASE NOTES

Applied in Medicare Rentals, Inc. v. Advanced Servs., 119 N.C. App. 767, 460 S.E.2d 361 (1995).

§ 75-16. Civil action by person injured; treble damages.

CASE NOTES

I. In General.
III. Damages.

I. IN GENERAL.

Postjudgment Interest. — This section provides for postjudgment interest on judgments for money damages generally, including a judgment for treble damages, until the judgment is paid. Custom Molders, Inc. v. American Yard Prods., Inc., 342 N.C. 133, 463 S.E.2d 199 (1995).

Violation of Federal Copyright Law. — The treble damages provision only authorizes the trebling of actual damages found to have resulted from violations of the Unfair and Deceptive Trade Practice Act. It does not purport to authorize trebling of either actual or statutory damages found recoverable for parallel violations of federal copyright law. Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

Cited in Isenhour v. Universal Underwriters Ins. Co., 341 N.C. 597, 461 S.E.2d 317 (1995).

III. DAMAGES.

Damages assessed pursuant to § 75-1.1, etc. —

Once a plaintiff has established the right to recover under § 75-1.1, the award of treble damages pursuant to this section is automatic and not discretionary. Peterson v. Bozzano, 183 Bankr. 735 (Bankr. M.D.N.C. 1995).

Claim based on the Debt Collection Act will not support punitive damages. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Wrongful Eviction Actions. — The prohibition against punitive or treble damages in wrongful eviction actions contained in § 42-25.9(a) of the Ejectment of Residential Tenants Act does not preclude tenants from recovering treble damages under this section and attorney's fees under § 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

§ 75-16.1. Attorney fee.

CASE NOTES

Willfulness Required for Award of Attorney's Fees. — While a showing of willfulness seems not to be required in order to establish a violation of the act with respect to ordinary damages, the portion of the statute relating to attorney's fees does require such showing. Standing v. Midgett, 850 F. Supp. 396 (E.D.N.C. 1993).

Findings Required. — The court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that he refused to resolve the matter fully, and that the attorney's fee was reasonable. Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994).

Plaintiff Not Entitled to Attorney's Fees. — Successful plaintiff in trade dress infringement action was not entitled to attorney's fees where the jury found that defendant did not intentionally copy plaintiff's trade dress. Tools USA & Equip. Co. v. Champ Frame Straightening Equip., Inc., 885 F.Supp. 141 (M.D.N.C. 1994).

Wrongful Eviction Actions. — The prohibition against punitive or treble damages in wrongful eviction actions contained in § 42-25.9(a) of the Ejectment of Residential Tenants Act does not preclude tenants from recovering treble damages under § 75-16 and attorney's fees under this section of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Findings of Fact Held Sufficient. — Plaintiff was entitled to attorneys' fees pursuant to this section in connection with services performed in appeal to the State Supreme Court which was necessary in order to protect plaintiff's right to postjudgment interest. Custom Molders, Inc. v. American Yard Prods., Inc., 342 N.C. 133, 463 S.E.2d 199 (1995).

Applied in Peterson v. Bozzano, 173 Bankr. 990 (Bankr. M.D.N.C. 1994).

Cited in Nintendo of Am., Inc. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

§ 75-16.2. Limitation of actions.

CASE NOTES

Applied in Barbee v. Atlantic Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117 (1994); Medicare Rentals, Inc. v. Advanced Servs., 119 N.C. App. 767, 460 S.E.2d 361 (1995).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

Legal Periodicals. —

For comment, "As If We Had Enough to Worry About ... Attorneys and the Federal Fair Debt Collection Practices Act: Supreme Court Rules on Former Attorney Exemption", see 18 Campbell L. Rev. 165 (1996).

CASE NOTES

Applied in Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 75-51. Threats and coercion.

CASE NOTES

Cited in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

§ 75-56. Application.

CASE NOTES

Cited in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Wall v. City of Raleigh, 121 N.C. App. 351, 465 S.E.2d 551 (1996).

ARTICLE 3.

Motor Fuel Marketing Act.

§ 75-81. Definitions.

The following terms shall have the meanings ascribed to them in this section unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

(1) "Person" shall mean any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) "Sale" shall mean selling, offering for sale or advertising for sale.

(3) "Motor Fuel" means motor fuel, as defined in G.S. 105-449.60, and alternative fuel, as defined in G.S. 105-449.130.

(4) "Cost" or "Costs" shall mean as follows:

(a) For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.

(b) For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including

prompt payment discounts and plus all applicable State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.

(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.

(6) "Affiliate" shall mean any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) "Motor Fuel Merchant" is any person selling motor fuel to the public.

(8) "Motor Fuel Outlet" is any retail facility selling motor fuel to the motoring public.

(9) "New Retail Outlet" shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.

(10) "Refiner" shall mean any person engaged in the production or refining of motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) "Terminal Supplier" shall mean any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility. (1985 (Reg. Sess., 1986), c. 972, s. 1; 1991 (Reg. Sess., 1992), c. 1007, s. 36; 1995, c. 390, s. 12.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, rewrote subdivision (3).

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Sec.
75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.
75A-10. Operating boat or manipulating water skis, etc., in reckless manner; operating, etc., while intoxicated, etc.; depositing or discharging litter, etc.
75A-13.2. Personal watercraft.

Article 1.

Boating Safety Act.

§ 75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

(a) It shall be the duty and responsibility of the North Carolina Wildlife Resources Commission to enforce and administer the provisions of this Chapter.

(b) The chairman of the Wildlife Resources Commission shall designate from among the members of the Wildlife Resources Commission three members who shall serve as the Motorboat Committee of the Wildlife Resources Commission, and who shall, in their activities with the Commission, place special emphasis on the administration and enforcement of this Chapter.

(c) The Boating Account is established within the Wildlife Resources Fund created under G.S. 143-250. All moneys collected pursuant to the numbering and titling provisions of this Chapter shall be credited to this Account. Gasoline excise tax revenue is credited to the Account under G.S. 105-449.126. Revenue in the Account shall be used by the Wildlife Resources Commission, subject to the Executive Budget Act and the Personnel Act, for the administration and enforcement of this Chapter; for activities relating to boating and water safety including education and waterway marking and improvement; and for boating access area acquisition, development, and maintenance. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003; 1981 (Reg. Sess., 1982), c. 1182, s. 2; 1993, c. 422, s. 1; 1995, c. 390, s. 13.)

Local Modification. — By virtue of Session Laws 1995 (Reg. Sess., 1996), c. 581, the local modification for Pender (Topsail Sound) by Session Laws 1991, c. 90 should be stricken from the main volume.

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, in subsection (c) divided the former second sentence into the present second and fourth sentences, in the present second sentence deleted "and pursuant to G.S. 105-446.2" following "Chapter", and "and" at the end of the sentence, added the third sentence, and added "Revenue in the Account shall be" in the present fourth sentence.

§ 75A-6. Classification; rules.

Local Modification. — Alexander, Burke, Caldwell, McDowell: 1995, c. 19, s. 1.

For additional local modifications to this section, see the main pamphlet.

§ 75A-10. Operating boat or manipulating water skis, etc., in reckless manner; operating, etc., while intoxicated, etc.; depositing or discharging litter, etc.

(a) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device on the waters of this State in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

(b) No person shall manipulate any water skis, surfboard, nonmotorized vessel, or similar device on the waters of this State while under the influence of an impairing substance.

(b1) No person shall operate any motorboat or motor vessel while underway on the waters of this State:

(1) While under the influence of an impairing substance, or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the boating, an alcohol concentration of 0.08 or more.

The fact that a person charged with violating this subsection is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this subsection or subsection (b) above.

The relevant definitions contained in G.S. 20-4.01 shall apply to this subsection and subsection (b) above.

(c) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State, any litter, raw sewage, bottles, cans, papers, or other liquid or solid materials which render the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.

(d) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged on the waters of this State or into the inland lake waters of this State any medical waste as defined by G.S. 130A-290 which renders the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes. (1959, c. 1064, s. 10; 1965, c. 634, s. 3; 1985, c. 615, ss. 1-5; 1989, c. 742, s. 1; 1995, c. 506, s. 14.)

Editor's Note. —

Session Laws 1995, c. 505, which amended this section, in s. 15 provides that the act shall not be construed to abate or affect any charges or violations occurring before September 15, 1995.

Effect of Amendments. — The 1995 amendment, effective September 15, 1995, and applicable to offenses committed on or after that date and to limited driving privileges issued after that date, substituted "0.08" for "0.10" in subdivision (b1)(2).

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

§ 75A-13.2. Personal watercraft.

(a) No person shall operate a personal watercraft on the waters of this State at any time between the hours from one hour after sunset to one hour before sunrise. For purposes of this section, "personal watercraft" means a small vessel which uses an outboard motor, or an inboard motor powering a water jet pump, as its primary source of motive power and which is designed to be operated by a person sitting, standing, or kneeling on, or being towed behind the vessel, rather than in the conventional manner of sitting or standing inside the vehicle.

(b) No person shall operate a personal watercraft unless each person riding on or being towed behind such vessel is wearing a personal flotation device approved by the United States Coast Guard.

(c) A personal watercraft must at all times be operated in a reasonable and prudent manner. Manuevers that endanger life, limb, or property, including:

(1) Unreasonably or unnecessarily weaving through congested vessel traffic;

(2) Jumping the wake of another vessel unreasonably or unnecessarily close to such other vessel or when visibility around such other vessel is obstructed; and

(3) Intentionally approaching another vessel in order to swerve at the last possible moment to avoid collision

shall constitute reckless operation of a vessel as provided in G.S. 75A-10.

(d) The provisions of this section do not apply to a performer engaged in a professional exhibition or a person or persons engaged in an activity authorized under G.S. 75A-14. (1993 (Reg. Sess., 1994), c. 753, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 42.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, deleted "class A-1 or A-2" following "means a small" in the second sentence of subsection (a).

§ 75A-15. Rules on water safety; adoption of the Uniform Waterway Marking System.

Local Modification. — By virtue of Session Laws 1995 (Reg. Sess., 1996), c. 581, the local modification for Pender (Topsail Sound) by Session Laws 1991, c. 90 should be stricken from the main volume.

§ 75A-17. Enforcement of Chapter.

Local Modification. — Catawba (As to establishment of No-Wake Zone on Lake Hickory), 1995 (Reg. Sess., 1996), c. 559.

Chapter 75D.

Racketeer Influenced and Corrupt Organizations.

Sec.
75D-6. Power to compel examination.
75D-7. False testimony.

§ 75D-1. Short title.

CASE NOTES

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

§ 75D-3. Definitions.

Editor's Note. —
Sections 14-78.1, 14-86, and 14-201 referred to above have been repealed by Session Laws 1994 Extra Session, c. 14, ss. 72(1), 72(3), and 72(10), effective October 1, 1994.

CASE NOTES

Racketeering Activity. — Where defendant was convicted of gambling in houses of public entertainment in violation of § 14-293, operating or possessing gambling devices in violation of § 14-302, and selling or possessing numbers tickets in violation of § 14-291.1, his actions constituted "racketeering activity" under the alternate definition established in this section. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Gambling is "racketeering activity" under the North Carolina RICO Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

§ 75D-5. RICO civil forfeiture proceedings.

CASE NOTES

Payment of Proceeds from Sale of Forfeited Property. — Since the Racketeer Influenced and Corrupt Organizations Act (RICO) provides that the proceeds from the sale of RICO forfeited property accrue to the State, such proceeds must therefore be paid to the public school fund as required by N.C. Const., Art. IX, § 7. State ex rel. Thornburg v. 532 "B" Street, 334 N.C. 290, 432 S.E.2d 684 (1993).

Evidence. — There was ample evidence to show that defendant's property was used in the course of a racketeering activity where the State's forecast of evidence revealed that each incident of criminal conduct took place on the real property for which forfeiture was sought, where also included in the State's evidence were affidavits of law enforcement officers showing without question that such property was used to further defendant's criminal activity, and where at the hearing before the trial court, the defendant made no effort to rebut or contest the State's evidence. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Pattern of Racketeering Activity. — Where the defendant engaged in at least two incidents of racketeering activity that had the same or similar purposes and methods of commission and at least one incident occurred within a four-year

period of the other, two of defendant's gambling convictions alone would constitute a "pattern of racketeering activity" under this Act. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Property Used in Furtherance of Unlawful Activity. — Where the evidence adduced at trial clearly showed that defendant engaged in a pattern of racketeering activity and that certain of his property was used in furtherance of such unlawful activity, the defendant's property was subject to forfeiture. State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

§ 75D-6. Power to compel examination.

Whenever the Attorney General has reason to believe that any person or enterprise may have information or may be in possession, custody or control of any documentary materials relevant to an activity prohibited under G.S. 75D-4, he may issue in writing, and cause to be served upon such person or upon the appropriate officers, agents, and employees of any such enterprise (other than one employed as an attorney by such person or enterprise), a notice requiring such person or enterprise to submit themselves to examination by him, and produce for his inspection any documentary material relevant to an investigation of activities prohibited by G.S. 75D-4.

The notice shall be served either personally or by registered or certified mail return receipt requested. The notice shall specify the general purpose of the examination, a general description of the documentary material to be produced, and the time and place where such examination will take place. The witness shall be placed under oath or affirmation to testify truthfully. The examination shall be recorded and the witness has the right to a copy upon payment of its cost. The witness has the right to have legal counsel present during the examination.

The Attorney General shall also have the right to apply to any judge of the superior court division, after five days' prior notice of such application served in the same manner as the notice of examination described in this section, for an order requiring such person or enterprise to appear and subject himself or itself to examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such court.

No such demand or order of a court shall contain any requirement which would be held to be unreasonable if contained in a civil discovery request or court order issued pursuant to G.S. 1A-1, Rules of Civil Procedure 26-36. Any person or enterprise upon whom a demand is served and who objects to complying with such demand in whole or in part, shall, within five days of service of the demand, serve a written reply upon the Attorney General specifying the nature of the objection.

Such examination shall be held in camera and no one, except the person or enterprise being examined, may release information obtained from the examination prior to a proceeding being instituted under this Chapter by the Attorney General. Such information may be used in any proceeding instituted under this Chapter by the Attorney General. Any person violating the provisions of this paragraph shall be guilty of a Class 1 misdemeanor. If such offending person is a public officer or employee, he shall also be

dismissed from such office or employment and shall not hold any public office or employment in this State for a period of five years after conviction. This paragraph does not prohibit disclosure of this information to other employees of the Department of Justice, or to district attorneys designated in writing by the Attorney General as authorized to receive this information. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1993, c. 539, s. 569; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 569, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 75D-7. False testimony.

False testimony as to any material fact by any person examined under the provisions of this Chapter shall constitute perjury and a conviction shall be punishable as in other cases of perjury as a Class F felony. (1985 (Reg. Sess., 1986), c. 999, s. 1; 1993, c. 539, s. 1286; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 1286, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 75D-14. Release of lien notice.

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

Chapter 75E.

Unlawful Activities in Connection With Certain Corporate Transactions.

Sec.
75E-1. Definitions.

§ 75E-1. Definitions.

The following words and phrases as used in this Chapter shall have the following meanings unless the context clearly requires otherwise:

(1) "Acquiring person statement" has the same meaning as G.S. 55-9A-02.

(2) "Business combination" has the same meaning as G.S. 55-9-01(b)(1).

(3) "Control share acquisition" has the same meaning as G.S. 55-9A-01(b)(3).

(4) "Person" includes "entity" (as that term is defined in G.S. 55-1-40(9)), "individual" (as that term is defined in G.S. 55-1-40(13)) and, without limiting the generality of the foregoing, "other entity" (as that term is defined in G.S. 55-9-01(b)(6)). (1991, c. 440, s. 1; 1993, c. 553, s. 25.)

Chapter 76.

Navigation.

Article 5.

General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

Editor's Note. —

Session Laws 1993, c. 539, ss. 570 and 1287, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

§ 76-41. Obstructing waters of Currituck Sound.

Editor's Note. — Session Laws 1993, c. 539, s. 571, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-42. Lumbermen to remove obstructions in Albemarle Sound.

Editor's Note. — Session Laws 1993, c. 539, s. 572, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-43. Anchorage in range of lighthouses.

Editor's Note. — Session Laws 1993, c. 539, s. 573, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-47. Acting as pilot without license.

Editor's Note. — Session Laws 1993, c. 539, s. 574, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the

effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-57. Rafts to exercise care in passing buoys, etc., penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 575, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 76-58. Interfering with buoys, beacons, and day marks.

Editor's Note. — Session Laws 1993, c. 539, s. 576, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 2.

Pilots.

Sec.
76A-12. Apprentices.
76A-16. Compulsory use of pilots.

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

Article 5.

Pilots.

Sec.
76A-46. Compulsory use of pilots.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1; 1987, c. 475.)

§ 76A-16. Compulsory use of pilots.

Every foreign vessel and every U.S. vessel sailing under register, including such vessels towing or being towed when underway in the Cape Fear River and Bar and over 60 gross tons, shall employ and take a State-licensed pilot, except when maneuvering during berthing or unberthing operations, shifting within the confine of ports or terminals, passing through bridges, with tug assistance and with a docking master aboard the vessel. Any master of a vessel violating this section shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-18. (1981, c. 910, s. 1; 1993, c. 539, s. 577; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 577, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 5.

Pilots.

§ 76A-46. Compulsory use of pilots.

Every foreign vessel and every United States vessel sailing under register, including such vessels towing or being towed when underway or docking in the waters of the Morehead City Harbor and Beaufort Bar, either incoming or outgoing, and over 60 gross tons, shall employ and utilize a State licensed pilot. Every foreign vessel sailing including such vessels towing or being towed when underway or docking in the Morehead City to Aurora water route, and over 60 gross tons, shall employ and utilize a State licensed pilot. Any master of a vessel violating this section by failing to use a State licensed pilot shall be guilty of a Class 1 misdemeanor except as provided for in G.S. 76A-54. (1981 (Reg. Sess., 1982), c. 1176, s. 1; 1985, c. 517, s. 3; 1993, c. 539, s. 578; 1994, Ex. Sess., c. 14, s. 45; c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 578, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 5.

High Rock Lake Marine Commission.

Sec.
77-57. Regulatory authority.

Article 1.

Commissioners for Opening and Clearing Streams.

§ 77-7. Failure of owner of dam to keep gates, etc.

Editor's Note. — Session Laws 1993, c. 539, s. 579, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 2.

Obstructions in Streams.

§ 77-12. Obstructing passage of boats.

Editor's Note. — Session Laws 1993, c. 539, s. 580, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 77-13. Obstructing streams a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 581, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 77-14. Obstructions in streams and drainage ditches.

Editor's Note. — Session Laws 1993, c. 539, s. 582, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Insurance company could not deny coverage to defendants where they did not intentionally harm their land, and they did not intentionally violate state or county law regarding streams or landfills. Nationwide Mut. Fire Ins. Co. v. Banks, 114 N.C. App. 760, 443 S.E.2d 93, cert. denied, 337 N.C. 695, 448 S.E.2d 530 (1994).

ARTICLE 4.

Lake Wylie Marine Commission.

§ 77-37. Regulations for Lake Wylie and shoreline area.

Editor's Note. — Session Laws 1993, c. 539, s. 583, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5.

High Rock Lake Marine Commission.

§ 77-57. Regulatory authority.

(a) Except as limited in subsection (b) below, by restrictions in any joint ordinance, and by other supervening provisions of law, the Commission may make regulations applicable to High Rock Lake and its shoreline area concerning all matters relating to or affecting the use of High Rock Lake. These regulations may not conflict with or supersede provisions of general or special acts or of regulations of State agencies promulgated under the authority of general law. No regulations adopted under the provisions of this section may be adopted by the Commission except after public hearing, with publication of notice of the hearing in a newspaper of general circulation in the two counties at least 10 days before the hearing. In lieu of or in addition to passing regulations supplementary to State law and regulations concerning the operation of vessels on High Rock Lake, the Commission may, after public notice, request that the Wildlife Resources Commission pass local regulations on this subject in accordance with the procedure established by appropriate State law.

(b) Violation of any regulation of the Commission commanding or prohibiting an act shall be a Class 3 misdemeanor.

(c) The regulations promulgated under this section take effect upon passage or upon such dates as may be stipulated in the regulations except that no regulation may be enforced unless adequate notice of the regulation has been posted in or on High Rock Lake or its shoreline area. Ordinances providing regulations for specific areas shall clearly establish the boundaries of the affected area by including a map of the regulated area, with the boundaries clearly drawn, or by setting out the boundaries in a written description, or by a combination of these techniques. Adequate

notice as to a regulation affecting only a particular location shall be given in the following manner. When an ordinance providing regulations for a specific area is proposed, owners of the parcel of land involved as shown on the county tax listing, and the owners of land within 500 feet of the proposed area to be regulated, as shown on the county tax listing, shall be mailed a notice of the proposed classification by first-class mail at the last addresses listed for such owners on the county tax abstracts. This mailing requirement does not apply in regulations affecting the entire lake. Notice shall also be given by a sign, uniform waterway marker, posted notice, or other effective method of communicating the essential provisions of the regulation in the immediate vicinity of the location in question. Where a regulation applies generally as to High Rock Lake or its shoreline area, or both, there must be a posting of notices, signs, or markers communicating the essential provisions in at least three different places throughout the area, and it shall be printed in a newspaper of general circulation in the two counties.

(d) A copy of each regulation promulgated under this section must be filed by the Commission with the following persons:

(1) The Secretary of State;

(2) The clerks of superior court of Davidson and Rowan Counties;

(3) The Executive Director of the Wildlife Resources Commission; and

(4) The federal Energy Regulatory Commission licensee for High Rock Lake.

(e) Any official designated in subsection (d) above may issue certified copies of regulations filed with the official under the seal of the official's office. Such certified copies may be received in evidence in any proceeding.

(f) Publication and filing of regulations promulgated under this section as required above are for informational purposes and is not a prerequisite to their validity if they in fact have been duly promulgated, the public has been notified as to the substance of the regulations, a copy of the text of all regulations is in fact available to any person who may be affected, and no party to any proceeding has been prejudiced by any defect that may exist with respect to publication and filing. Rules and regulations promulgated by the Commission under the provisions of other sections of this Article relating to internal governance of the Commission need not be filed or published. Where posting of any sign, notice, or marker, or the making of other communication is essential to the validity of a regulation duly promulgated, it is presumed in any proceeding that prior notice was given and maintained and the burden lies upon the party asserting to the contrary to prove lack of adequate notice of any regulation. (1993, c. 355, s. 8; 1993 (Reg. Sess., 1994), c. 767, s. 27.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

Sec.
78A-2. Definitions.

ARTICLE 1.

Title and Definitions.

§ 78A-1. Title.

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

§ 78A-2. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Administrator" means the Secretary of State.

(2) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include:

a. A salesman,

b. A bank, savings institution, or trust company,

c. A person who has no place of business in this State if

1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or

2. In the case of a person registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934 and in one or more states, during any period of 12 consecutive months he does not effect more than 15 purchases or sales in this State in any manner with persons other than those specified in clause 1, whether or not the dealer or any of the purchasers or sellers is then present in this State, or

d. An issuer if

1. The security is exempted under subdivisions (1), (2), (3), (4), (5), (7), (9), (10), (11), (13), or (14) of G.S. 78A-16, or the transaction is exempted under G.S. 78A-17, and such exemption has not been denied or revoked under G.S. 78A-18, or

2. The security is registered under this Chapter and it is offered and sold through a registered dealer, or
3. All of the following conditions are met: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State; (ii) the total amount of the offering, both within and without this State, does not exceed two million five hundred thousand dollars ($2,500,000); and (iii) the total number of purchasers, both within and without this State, does not exceed 100. Provided, however, the Administrator may by rule or order waive the condition imposed by subdivision (iii) hereof; or
4. The security is issued by an open-end management company that is registered under the Investment Company Act of 1940 and so long as no sales load is paid or given, directly or indirectly.

e. A person who acts as a business broker with respect to a transaction involving the offer or sale of all of the stock in any closely held corporation provided that such stock is sold to no more than one person, as that term is defined herein.

(3) "Fraud," "deceit," and "defraud" are not limited to common-law deceit.

(4) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.

(5) "Issuer" means any person who issues or proposes to issue any security, except that

a. With respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted-management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and

b. With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payments out of production under such titles or leases, there is not considered to be any "issuer."

(6) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(7) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(8)a. "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

b. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

c. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other

thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

d. A purported gift of assessable stock is considered to involve an offer and sale.

e. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

f. The terms defined in this subdivision and the term "purchase" as used in this Chapter do not include

1. Any bona fide loan, pledge, or other transaction creating a bona fide security interest;
2. Any stock split and any security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by security holders for the dividend other than the surrender of a right to a cash or property dividend when each security holder may elect to take the dividend in cash or property or in securities;
3. Any transaction incident to a class vote by security holders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or
4. Any transaction incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash.

(9) "Salesman" means any individual other than a dealer who represents a dealer in effecting or attempting to effect purchases or sales of securities. A partner, executive officer, or director of a dealer, or a person occupying a similar status or performing similar functions, is a salesman only if he otherwise comes within this definition.

(10) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," "Investment Company Act of 1940," and "Internal Revenue Code" mean the federal statutes of those names as amended before or after April 1, 1975.

(11) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract including without limitation any investment contract taking the form of a whiskey warehouse receipt or other investment of money in whiskey or malt beverages; voting-trust certificate; certificate of deposit for a security; certificate of interest or

participation in an oil, gas, or mining title or lease or in payments out of production under a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy, funding agreement, as defined in G.S. 58-7-16, or annuity contract under which an insurance company promises to pay (i) a fixed sum of money either in a lump sum or periodically for life or for some other specified period, or (ii) benefits or payments or value that vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with a contract have been placed if the delivering or issuing insurance company has currently satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-7-95.

(12) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3; 1955, c. 436, s. 1; 1973, c. 1380; 1983, c. 817, ss. 1-3; 1987, c. 849, s. 1; 1989, c. 12, s. 1; 1993 (Reg. Sess., 1994), c. 600, s. 3; 1995, c. 509, s. 35.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted a comma following "(5)" in subdivision (2)d.1.

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

Article 2.

Fraudulent and Other Prohibited Practices.

§ 78A-8. Sales and purchases.

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

ARTICLE 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

CASE NOTES

Motion to Dismiss Claims as Barred by This Section Denied. — Since the dates for the sale or contract for sale of securities could not be determined from the face of the complaint, plaintiffs' claims were not barred on their face by the North Carolina Securities Act's two-year statute of limitations, and defendant's motion to dismiss the North Carolina Securities Act claims as barred by that statute was denied. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

Statute of limitations defense failed where count related back to the original complaint which was filed well within the two-year period of subsection (f). Simpson v. Specialty Retail Concepts, Inc., 908 F. Supp. 323 (M.D.N.C. 1995).

ARTICLE 8.

Miscellaneous Provisions.

§ 78A-65. Repeal and saving provisions.

CASE NOTES

Cited in Teague v. Bakker, 35 F.3d 978 (4th Cir. 1994).

Chapter 78B.

Tender Offer Disclosure Act.

Sec.
78B-8. Criminal penalties.

§ 78B-8. Criminal penalties.

(a) Any person who willfully violates this Chapter may be fined not more than five thousand dollars ($5,000) or imprisoned for not more than two years or both. Each of the acts specified herein shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this Chapter more than two years after the alleged violation.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime under any other statute. (1977, c. 781, s. 1; 1987, c. 282, s. 10.)

Chapter 78C.

Investment Advisers.

Article 4.

Administration and Review.

Sec.
78C-28. Injunctions; cease and desist orders; civil penalties.

Article 5.

Civil Liabilities and Criminal Penalties.

78C-38. Civil liabilities.
Sec.
78C-39. Criminal penalties.

Article 8.

Regulation of Athlete Agents.

78C-78. Remedies for violation; criminal penalty.

Article 1.

Title and Definitions.

§ 78C-1. Title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

Article 2.

Fraudulent and Prohibited Practices.

§ 78C-8. Advisory activities.

CASE NOTES

There was sufficient evidence to support an indictment for a violation of this section where the State presented evidence showing that defendant advised the victims, for a 10 percent (10%) commission, to invest in the securities of several corporations and that defendant told the victims that the value of these securities would increase by various amounts in the future, promising extravagantly large returns on their original investment. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Article 4.

Administration and Review.

§ 78C-28. Injunctions; cease and desist orders; civil penalties.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of

competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. In addition to any other remedies provided by this Chapter, the Administrator may apply to the court hearing this matter for an order of restitution whereby the defendant in such action shall be ordered to make restitution of those sums shown by the Administrator to have been obtained by him in violation of any of the provisions of this Chapter. Such restitution shall be payable, in the discretion of the court, to the Administrator or receiver appointed pursuant to this section for the benefit of those persons whose assets were obtained in violation of this Chapter, or directly to those persons. The court may not require the Administrator to post a bond.

(b)(1) If the Administrator determines after giving notice of an opportunity for a hearing, that any person has engaged in, or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.

(2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78C-28(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be set down for hearing to determine whether or not the order shall become permanent and final. If no hearing is requested and none is ordered by the Administrator, the order shall remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.

(3) No order under subsection (b) of this section, except an order issued pursuant to G.S. 78C-28(b)(2), may be entered without prior notice or an opportunity for hearing. The Administrator may vacate or modify an order under subsection (b) of this section upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.

(4) A final order issued pursuant to the provisions of subsection (b) of this section shall be subject to review as provided in G.S. 78C-29.

(c) The Administrator may issue an order against an applicant, registered person, or other person who willfully violates this Chapter or a rule or order of the Administrator under this Chapter:

(1) Imposing a civil penalty of up to two thousand five hundred dollars ($2,500) for a single violation or of up to twenty-five

thousand dollars ($25,000) for multiple violations in a single proceeding or a series of related proceedings; and

(2) Requiring reimbursement of the costs of investigation.

Any civil penalty or reimbursement imposed under this subsection shall be paid into the General Fund. No order authorized by this subsection may be entered without prior notice of an opportunity for a hearing conducted pursuant to Article 3 of Chapter 150B of the General Statutes. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 7.)

Article 5.

Civil Liabilities and Criminal Penalties.

§ 78C-38. Civil liabilities.

(a) Any person who:

(1) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities, in violation of G.S. 78C-8(b), G.S. 78C-16(a) or (b) (an action pursuant to a violation of G.S. 78C-16(b) may not be maintained except by those persons who directly received advice from the unregistered investment adviser representative), G.S. 78C-10(b), or of any rule or order under G.S. 78C-30(d) which requires the affirmative approval of sales literature before it is used, or

(2) Receives, directly or indirectly, any consideration from another person for advice as to the value of securities or their purchase or sale, whether through the issuance of analyses, reports or otherwise and employs any device, scheme, or artifice to defraud such other person or engages in any act, practice or course of business which operates or would operate as a fraud or deceit on such other person, in violation of G.S. 78C-8(a)(1) or (2),

is liable to any person who is given such advice in such violation, who may sue either at law or in equity to recover (i) the consideration paid for such advice together with interest thereon at the legal rate as provided in G.S. 24-1 from the date of payment of the consideration, plus (ii) the actual damages to such person proximately caused by such violation, plus (iii) costs of the action and reasonable attorneys' fees. An action based on violation of G.S. 78C-8(b) may not prevail where the person accused of the violation sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(b) Every person who directly or indirectly controls a person liable under subsection (a) of this section, including every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions, every employee or associate of such a person who materially aids in the conduct giving rise to the liability, and every dealer or salesman who materially aids in such conduct is liable jointly and severally with and to the same extent as

such person, unless able to sustain the burden of proof that he did not know, and in the exercise of reasonable care should not have known of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable and as provided among tort-feasors pursuant to Chapter 1B of the General Statutes.

(c) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(d) No person may sue under this section more than three years after the rendering of investment advice in violation of this Chapter, except that in the case of a violation of G.S. 78C-8(a)(1) or (2) a person may sue under this section within two years after such person discovers or should have discovered, the facts constituting the violation.

(e) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(f) Any condition, stipulation, or provision binding any person receiving any investment advice to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(g) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78C-17(e). (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 8.)

§ 78C-39. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78C-8(a)(1), 78C-8(a)(2), 78C-8(b), or 78C-9 or who willfully violates G.S. 78C-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon. Any person who willfully violates G.S. 78C-8(a)(1), 78C-8(a)(2), or 78C-8(b) shall, upon conviction, be punished as a Class H felon.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter. Upon receipt of such reference, the district attorney may request that a duly employed attorney of the Administrator prosecute or assist in the prosecution of such violation or violations on behalf of the State. Upon approval of the Administrator, such employee may be appointed a special prosecutor for the district attorney to prosecute or assist in the prosecution of such violations without receiving compensation from the district attorney. Such special prosecutor shall have all the powers and duties prescribed by law for district attorneys and such other powers and duties as are lawfully delegated to such special prosecutor by the district attorney for violations of this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1987 (Reg. Sess., 1988), c. 1098, s. 1; 1991, c. 456, s. 9.)

ARTICLE 8.

Regulation of Athlete Agents.

§ 78C-78. Remedies for violation; criminal penalty.

(a) In any civil action brought based upon a violation of G.S. 78C-72(a) or G.S. 78C-76, the relief granted by the court may include the following:

(1) Forfeiture of any right of repayment the athlete agent may otherwise have for anything of value either received by an athlete as an inducement to enter into any agent contract or financial services contract or received by an athlete before completion of the athlete's last high school or intercollegiate contest;

(2) A refund of any consideration paid to the athlete agent on an athlete's behalf; or

(3) Reasonable attorney's fees and court costs incurred by an injured party.

(b) Any agent contract or financial services contract that is negotiated by an athlete agent who has failed to comply with this Article is voidable at the option of the injured party.

(c) An athlete agent commits an offense if the agent knowingly violates G.S. 78C-72(a) or G.S. 78C-76. An offense under this subsection shall be punished as a Class I felony.

(d) The Secretary of State may refer such evidence as is available concerning violations of this Article or of any rule or order hereunder to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Article. Upon receipt of such reference, the district attorney may request that a duly employed attorney of the Secretary of State assist in the prosecution of such violation or violations on behalf of the State.

(e) Nothing in this Article limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1989 (Reg. Sess., 1990), c. 865, s. 1; 1993, c. 539, s. 1288; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 1288, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 80.

Trademarks, Brands, etc.

Article 1.

Trademark Registration Act.

Sec.
80-11.1. Criminal use of counterfeit trademark.
80-12. Violation a deceptive or unfair trade practice.

Article 1.

Trademark Registration Act.

§ 80-11.1. Criminal use of counterfeit trademark.

(a) For purposes of this section:

(1) "Counterfeit mark" means a mark that is used in connection with the sale or offering for sale of goods or services that are identical to or substantially indistinguishable from the goods or services with which the mark is used or registered, and the use of which is likely to cause confusion, mistake, or deception, with the use occurring without authorization of the:

a. Owner of the registered mark, and is identical to or substantially indistinguishable from a mark that is registered on the principal register of the United States Patent and Trademark Office or with the Trademark Division of the Department of the Secretary of State; or

b. Owner of the unregistered mark and is identical to or substantially indistinguishable from symbols, signs, emblems, insignias, trademarks, trade names, or words protected by section 110 of the Amateur Sports Act of 1978 (Title 36, U.S.C. § 380).

(2) "Retail sales value" means the value computed by multiplying the number of items having a counterfeit mark used thereon or in connection therewith, by the retail price at which a similar item having a mark used thereon or in connection therewith, the use of which is authorized by the owner, is offered for sale to the public.

(b) Any person who knowingly and willfully (i) uses or causes to be used a counterfeit mark on or in connection with goods or services intended for sale or (ii) has possession, custody, or control of goods having a counterfeit mark used thereon or in connection therewith, that are intended for sale, shall be punished as follows:

(1) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection with which the person intends to use a counterfeit mark, have a retail sales value not exceeding three thousand dollars ($3,000), the person is guilty of a Class 2 misdemeanor;

(2) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection

with which the person intends to use a counterfeit mark, have a retail sales value exceeding three thousand dollars ($3,000) but not exceeding ten thousand dollars ($10,000), the person is guilty of a Class I felony; and

(3) If the goods or services having a counterfeit mark used thereon or in connection therewith, or on or in connection with which the person intends to use a counterfeit mark, have a retail sales value exceeding ten thousand dollars ($10,000), the person is guilty of a Class H felony.

The possession, custody, or control of more than 25 items having a counterfeit mark used thereon or in connection therewith creates a presumption that the person having possession, custody, or control of the items intended to sell those items.

(c) Any person who knowingly (i) uses any object, tool, machine, or other device to produce or reproduce a counterfeit mark or (ii) has possession, custody, or control of any object, tool, machine, or device with intent to produce or reproduce a counterfeit mark, is guilty of a Class H felony.

(d) Any personal property, including any item, object, tool, machine, device, or vehicle of any kind, employed as an instrumentality in the commission of, or in aiding or abetting in the commission of a violation of subsection (b) or (c) of this section, is subject to seizure and forfeiture and shall be disposed of in accordance with the provisions of Article 2 of Chapter 15 of the General Statutes.

(e) For purposes of enforcing this section, the Department of the Secretary of State's law enforcement agents have statewide jurisdiction. These law enforcement agents may assist local law enforcement agencies in their investigations and may initiate and carry out, in coordination with local law enforcement agencies, investigations of violations of this section. These law enforcement agents have all of the powers and authority of law enforcement officers when executing arrest warrants. These agents shall be authorized to have fictitious licenses, license tags, and registrations, pursuant to G.S. 20-39(h) or G.S. 14-250, for the purpose of conducting criminal investigations.

(f) The Secretary of State may refer any available evidence concerning violations of this section to the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings.

The attorneys employed by the Secretary of State shall be available to prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney and the Secretary of State approves.

(g) Pursuant to an agreement between the departments, the Secretary of State may refer any available evidence concerning violations of this section to the Secretary of Revenue for purposes of determining the obligations of the violators of this section to the State under the provisions of Chapter 105 of the General Statutes. (1995, c. 436, s. 1.)

Editor's Note. — Session Laws 1995, c. 436, s. 3, provides that this section is effective December 1, 1995, and is applicable to offenses committed on or after that date and to causes of action arising on or after that date.

§ 80-12. Violation a deceptive or unfair trade practice.

A violation of G.S. 80-10 or G.S. 80-11 constitutes a violation of G.S. 75-1.1. (1903, c. 271, s. 8; Rev., s. 3021; C.S., s. 3980; 1941, c. 255, s. 3; 1967, c. 1007, s. 1; 1995, c. 436, s. 2.)

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date and to causes of action arising on or after that date, rewrote this section.

Article 2.

Timber Marks.

§ 80-20. Fraudulent use of timber trademark, misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 584, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-22. Altering timber trademark crime.

Editor's Note. — Session Laws 1993, c. 539, s. 585, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-23. Possession of branded logs without consent, misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 586, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 5.

Stamping of Gold and Silver Articles.

§ 80-40. Marking gold articles regulated.

Editor's Note. — Session Laws 1993, c. 539, s. 587, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that

would be applicable but for this act remain applicable to those prosecutions."

§ 80-41. Marking silver articles regulated.

Editor's Note. — Session Laws 1993, c. 539, s. 588, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-42. Marking articles of gold plate regulated.

Editor's Note. — Session Laws 1993, c. 539, s. 589, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-43. Marking articles of silver plate regulated.

Editor's Note. — Session Laws 1993, c. 539, s. 590, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 80-44. Violation of Article misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 591, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 8.

Registration and Protection of Livestock Brands.

§ 80-66. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 592, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 81A.

Weights and Measures Act of 1975.

ARTICLE 3.

Violations.

§ 81A-29. Offenses and penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 593, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Scale Technician.

§ 81A-80. Suspension or revocation of registration; penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 594, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 84.

Attorneys-at-Law.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-4.1. Limited practice of out-of-state attorneys.

CASE NOTES

Cited in State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

ARTICLE 4.

North Carolina State Bar.

§ 84-28.2. Persons immune from suit.

CASE NOTES

Cited in Wallace v. Jarvis, 119 N.C. App. 582, 459 S.E.2d 44 (1995).

Chapter 85B.

Auctions and Auctioneers.

Sec.
85B-4. Licenses required.
85B-6. Fees; local governments not to charge fees or require licenses.
Sec.
85B-7.1. Handling clients' funds.
85B-9. Penalties and enforcement.

§ 85B-1. Definitions.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 85B-4. Licenses required.

(a) No person who is not exempt under G.S. 85B-2, shall sell, or offer to sell, goods or real estate at auction in this State or perform any act for which an auction firm license is required unless the person holds a currently valid license issued under this Chapter.

(b) No person shall be licensed as an apprentice auctioneer, auctioneer, or receive an auction firm license if the person:

(1) Is under 18 years of age;

(2) Repealed by Session Laws 1983, c. 751, s. 6.

(3) Has within the preceding five years pleaded guilty to, entered a plea of nolo contendere or been convicted of any felony, or committed or been convicted of any act involving fraud or moral turpitude;

(4) Has had an auctioneer or apprentice auctioneer or auction firm license revoked; or

(5) Has, within the preceding five years, committed any act which constitutes grounds for license suspension or revocation under this Chapter or a Commission rule.

(c) Each applicant for an apprentice auctioneer license shall submit a written application in a form approved by the Commission and containing at least two statements by residents of the community in which the applicant resides attesting to the applicant's good moral character.

(c1) Each apprentice auctioneer application and license shall name a licensed auctioneer to serve as the supervisor of the apprentice. No apprentice auctioneer may enter into an agreement to conduct an auction, or conduct an auction, without the express approval of his supervisor. The supervisor shall review all contracts before approving them and shall regularly review the records his apprentice is required to maintain under G.S. 85B-7 to see that they are accurate and current, and shall perform such other supervisory duties as may be required by the Commission.

(d) No person shall be licensed as an auctioneer unless the person has held an apprentice auctioneer license and served as an apprentice auctioneer for the two preceding years, accumulated sufficient knowledge and experience in such areas of the auctioneer profession as the Commission may deem appropriate, and has taken an examination approved by the Commission and performed on it to the satisfaction of the Commission. The examination shall test the

applicant's understanding of the law relating to auctioneers and auctions, ethical practices for auctioneers, the mathematics applicable to the auctioneer business, and such other matters relating to auctions as the Commission considers appropriate. The examination shall be given at least twice each year in Raleigh, and at other times and places the Commission designates, but no person shall be allowed to take the examination within six months after having failed it a second time.

Any person who has been in the auctioneer business in this State for at least two years prior to the effective date of this act [July 1, 1973], and who makes proper application to the Commission within one year after July 1, 1973, may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice of two years, and without taking the examination required by this subsection. Any person who has successfully completed the equivalent of at least 80 hours of classroom instruction in a course in auctioneering at an institution approved by the Commission may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice for two years, but must take the examination required by this subsection and perform on it to the satisfaction of the Commission.

Each applicant for an auctioneer license shall submit a written application in a form approved by the Commission. If the applicant has been previously licensed as an apprentice auctioneer, the application shall contain an evaluation by the applicant's supervisor of the applicant's performance as an apprentice auctioneer and the applicant's performance in specific areas as required by the Commission. If the applicant is exempted from apprenticeship after completion of the equivalent of at least 80 hours of classroom instruction in auctioneering, the application shall contain a transcript of the applicant's course work in auctioneering. Each application shall be accompanied by statements of at least two residents of the community in which the applicant resides attesting to the applicant's good moral character. The Commission may require verification of any information included in an application for an auctioneer license and may request other information or verification of information provided to determine whether the applicant possesses the good moral character or other qualifications for licensure.

(e) Each license issued under this Chapter shall be valid from July 1 of the year issued, or from the date issued, whichever is later, to the following June 30 unless sooner revoked or suspended pursuant to this Chapter or a rule of the Commission. A license may be renewed for one year at a time, except an apprentice auctioneer license may not be renewed for more than three times. No examination shall be required for renewal of an auctioneer license if the application for renewal is made within 24 months of the expiration of the previous license.

(f) No person shall be issued an auctioneer or apprentice auctioneer license until the person has made the contribution to the Fund as required by G.S. 85B-4.1.

(g) An auction firm must be licensed by the Board even though no owner or officer of the firm acts as an auctioneer. To be licensed an auction firm must make the contribution to the Fund as required by G.S. 85B-4.1 and must pay the proper fees as set out in G.S. 85B-6. Auction firms are covered by the provisions of G.S. 85B-8.

An auction firm license issued by the Commission is restricted to the persons named in the license and does not inure to the benefit of

any other person. Where a license is issued to an auction firm, authority to transact business under the license is limited to the person or persons designated in the application and named in the license.

The designated person or persons, prior to being licensed, shall be required to take a written examination, approved by the Commission, and demonstrate to the satisfaction of the Commission a thorough understanding of the law relating to the conduct of the auction business and other matters the Commission deems appropriate. An individual who is licensed as an auctioneer and who is the designated person applying for an auction firm license is not required to take the auction firm examination. Licensed real estate brokers and real estate firms may be exempt from the auction firm examination provided they employ or associate themselves with a licensed auctioneer to handle those aspects of the transactions peculiar to the auctioneer profession. Any person or entity, on the effective date of this Chapter, duly licensed as an auction firm in good standing is not required to take any examination in order to maintain or to renew an auction firm license provided that the license does not otherwise expire or lapse and is not suspended or revoked by the Commission.

(h) The Commission shall publish at least once a year a list of names and addresses of all persons, sole proprietorships, partnerships and corporations holding valid apprentice auctioneer, auctioneer, or auction firm licenses.

(i) The Commission may investigate as it deems necessary the ethical background of any applicant for licensure under this Chapter. (1973, c. 552, s. 4; c. 1195, ss. 1, 2; 1975, c. 648, ss. 2-4; 1983, c. 603, s. 4; c. 751, ss. 6-8; 1989, c. 732, s. 1; 1991 (Reg. Sess., 1992), c. 819, s. 4; c. 1030, s. 51.5; 1993, c. 421, s. 3.)

Editor's Note. — Session Laws 1993, c. 421, s. 3, amended this section effective July 21, 1993, and applicable to fees due on or after that date, by, in the first sentence of the first paragraph of subsection (g), substituting "by the Board" for "as an auctioneer business" and substituting "the firm" for "that business".

§ 85B-6. Fees; local governments not to charge fees or require licenses.

(a) The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following:

Item	Maximum Fee
Apprentice Auctioneers:	
Application for license	$ 50.00
Issuance or renewal of license	50.00
Auctioneers:	
Application for license	50.00
Examination	25.00
Issuance or renewal of license	100.00
Auction Firms:	
Application for license	50.00
Examination	25.00
Issuance or renewal of license	100.00
Reinstatement of License	25.00.

An application fee for a license and an examination fee are nonrefundable. The amount payable by a nonresident under G.S. 85B-5 to obtain a nonresident reciprocal auctioneer license is the greater of the amount set in the above table for an examination for and the issuance of an auctioneer's license and the amount the nonresident's state would charge a resident auctioneer of this State to obtain a comparable license from that state.

A reinstatement fee is payable when a person applies for renewal of a license after the license has lapsed for failure to renew it before it expired. The reinstatement of a lapsed license is not retroactive in effect and does not limit the authority of the courts or of the Commission to take disciplinary action against a person who engages in the auctioneer profession with a lapsed license.

(b) No local government or agency of local government may charge any fees or require any licenses for auctioneers, apprentice auctioneers, or auction firms in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess., c. 1219, s. 43.7; 1983, c. 751, s. 12; 1991 (Reg. Sess., 1992), c. 819, s. 18; 1993, c. 421, s. 1.)

Editor's Note. — Session Laws 1993, c. 421, s. 1, amended this section effective July 21, 1993, and applicable to fees due on or after that date, by rewriting subsection (a) and in subsection (b) substituting "auction firms" for "auctioneer businesses".

§ 85B-7.1. Handling clients' funds.

(a) Each licensee shall maintain a trust or escrow account and shall deposit in the account all funds that are received for the benefit of another person and are not disbursed to the seller on auction day. The licensee shall deposit funds that are not disbursed on auction day with an insured bank or savings and loan association located in North Carolina. A licensee who disburses funds on auction day shall prepare a receipt or settlement statement for the disbursed funds that contains the name and address of the person receiving the disbursement and the amount of the disbursement. The receipt or statement shall be signed by the licensee and the person receiving the disbursement.

(b) Each licensee shall maintain, for not less than five years, complete records showing the deposit, maintenance, and withdrawal of trust or escrow funds and the disbursement of funds on auction day. Records of the disbursement of funds on auction day shall include a copy of each receipt or settlement statement issued when the funds were disbursed. The Commission or its designated agent may inspect these records periodically, without prior notice, and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee. (1991 (Reg. Sess., 1992), c. 819, s. 20; 1993, c. 421, s. 2.)

§ 85B-9. Penalties and enforcement.

(a) Any person, corporation or association of persons violating the provisions of G.S. 85B-4(a) shall be guilty of a Class 1 misdemeanor.

(b) The Commission may in its own name seek injunctive relief in the General Court of Justice to restrain any violation or anticipated

violation of the provisions of G.S. 85B-4(a) or any violation of this Chapter.

(c) The Commission shall be entitled to the services of the Attorney General of North Carolina in enforcing the provisions of this Chapter or may employ an attorney to assist and represent it in enforcement of specific matters. (1973, c. 1195, s. 6; 1975, c. 648, s. 7; 1991 (Reg. Sess., 1992), c. 819, s. 22; 1993, c. 539, s. 600; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 600, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 86A.

Editor's Note. — The legislation and annotations affecting Chapter 86A have been included in a recently published replacement chapter.

Chapter 87.
Contractors.

Article 4.

Electrical Contractors.

Sec.
87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.
87-40. Secretary-treasurer.
87-43.2. Issuance of license.
87-43.3. Classification of licenses.
87-43.4. Residential dwelling license.
87-47. Penalties imposed by Board; enforcement procedures.

Article 5.

Refrigeration Contractors.

87-52. State Board of Refrigeration Examiners; appointment; term of office.
87-58. Definitions; contractors licensed by Board; examinations.
87-59. Revocation or suspension of license for cause.
87-61. Violations made misdemeanor; employees of licensees excepted.

Article 7.

North Carolina Well Construction Act.

87-94. Civil penalties.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

CASE NOTES

II. Unlicensed Contractors.
III. Subcontractors.

II. UNLICENSED CONTRACTORS.

"Owner's Exemption" for Joint Venturer. — Where plaintiff was acting as a joint venturer, it fit under the "owner's exemption" and was not acting as a general contractor under this section, and therefore is not subject to licensing under the statute. Paving Equip., Inc. v. Lake Providence Properties, Inc., 168 Bankr. 864 (Bankr. W.D.N.C. 1993), aff'd, 168 Bankr. 876 (W.D.N.C. 1994).

Failure to comply with the licensing statute does not destroy a partner's equity interest in a joint venture in which his capital contribution takes the form of construction and other services. Paving Equip., Inc. v. Lake Providence Properties, Inc., 168 Bankr. 876 (W.D.N.C. 1994), aff'd, 51 F.3d 267 (4th Cir. 1995).

III. SUBCONTRACTORS.

Subcontractors Not Required to Be Licensed. —

Where the public is protected by a State agency which has been delegated the authority to supervise the construction and maintenance of highways and highway bridges, the protection of the public does not require licensure of a subcontractor who contracts to perform a small portion of replacement bridge construction and whose work is closely supervised by the State agency. Florence Concrete Prods., Inc. v. North Carolina Licensing Bd., 341 N.C. 134, 459 S.E.2d 201 (1995).

Article 4.

Electrical Contractors.

§ 87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.

(a) The State Board of Examiners of Electrical Contractors shall continue as the State agency responsible for the licensing of persons engaging in electrical contracting within this State, and shall consist of one member from the North Carolina Department of Insurance to be designated by the Commissioner of Insurance; one member who has satisfied the requirements for an unlimited license as defined in G.S. 87-43.3 and who is a representative of the North Carolina Association of Electrical Contractors to be designated by the governing body of that organization; and five members to be appointed by the Governor: one from the faculty of The Greater University of North Carolina who teaches or does research in the field of electrical engineering, one who is serving as a chief electrical inspector of a municipality or county in North Carolina, one who has satisfied the requirements for an unlimited license as defined in G.S. 87-43.3 and who is a representative of the Carolinas Electrical Contractors Association operating a sole proprietorship, partnership or corporation located in North Carolina which is actively engaged in the business of electrical contracting, and two who have no ties with the construction industry and who represent the interest of the public at large.

(b) Members of the Board shall serve staggered seven-year terms. Each member shall serve until his or her successor is designated or appointed, and is duly qualified. Vacancies occurring during a term shall be filled for the remainder of that term by the authority that designated or appointed the departing member.

(c) Members of the Board shall not serve consecutive, complete terms. For purposes of this subsection, only a term of less than seven years that results from the filling of a vacancy is an incomplete term; a term of less than seven years that results from the successor's late designation or appointment is not an incomplete term.

(d) All members shall be residents of North Carolina during their tenure on the Board. Any member of the Board may be removed by the authority that designated or appointed that member for misconduct, incompetency, or neglect of duty.

(e) The Board shall hold regular meetings quarterly and may hold meetings on call of the chair. The chair shall be required to call a special meeting upon written request by two members of the Board. At its regular first quarter meeting, the Board shall elect from its membership a chair and a vice-chair, each to serve for one year. Four members of the Board shall constitute a quorum. The principal office of the Board shall be at such place as shall be designated by a majority of the members thereof. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5.

(f) Before entering upon the performance of his or her duties hereunder, each member of the Board shall take and file with the Secretary of State an oath in writing to properly perform the duties

of his or her office as a member of the Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1937, c. 87, s. 1; 1969, c. 669, s. 1; 1979, c. 904, ss. 1-3; 1989, c. 709, s. 1; 1995, c. 114, s. 1.)

Editor's Note. — Session Laws 1995, c. 114, s. 5, effective January 1, 1997, provides that, notwithstanding the provisions of § 87-39 to the contrary, the terms of members serving on the Board on January 1, 1997 shall expire upon completion of those terms. The following expiration of terms shall apply: the term of one member who represents the interest of the public at large on June 30, 2004; the representative of the Association of Electrical Contractors on June 30, 2005; the chief electrical inspector of a municipality or county on June 30, 2006; and the remaining appointments seven years after their successors' terms expire. Thereafter all terms shall be seven years. Members serving terms less than seven years are not serving complete terms and are eligible for redesignation or appointment to the Board.

Effect of Amendments. — The 1995 amendment, effective January 1, 1997, added the subsection (a), (e) and (f) designations; in subsection (a) deleted the last four sentences regarding the seven year length of terms, filling of vacancies during an unexpired term, North Carolina citizenship and residence of members during their tenure, and consecutive terms; added subsections (b), (c), and (d); in subsection (e) substituted the present third sentence for "The Board shall, at the first meeting following appointment of the new member in each year, meet and elect from its membership a chairman and vice chairman, each to serve for one year"; and made stylistic and gender neutral changes in the catchline and subsections (e) and (f).

§ 87-40. Secretary-treasurer.

At its regular first quarter meeting, the Board shall appoint a secretary-treasurer to serve for one year. The secretary-treasurer need not be a member of the Board, and the Board is authorized to employ a full-time secretary-treasurer and such other assistants and to make such other expenditures as may be necessary to the proper performance of the duties of the Board under this Article. The compensation and the duties of the secretary-treasurer shall be fixed by the Board, and the secretary-treasurer shall give bond in such sum and form as the Board shall require for the faithful performance of duty. The secretary-treasurer shall keep a record of the proceedings of said Board and shall receive and account for all moneys derived from the operations of the Board under this Article. (1937, c. 87, ss. 2, 3; 1969, c. 669, s. 1; 1995, c. 114, s. 2.)

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, substituted the present first sentence for "The State Board of Examiners of Electrical Contractors shall at its first meeting following appointment of the new member in each year appoint a secretary-treasurer for a period of one year"; and substituted "duty" for "his duties" at the end of the third sentence.

§ 87-43.2. Issuance of license.

(a) A person, partnership, firm, or corporation shall be eligible to be licensed as an electrical contractor and to have such license renewed, subject to the provisions of this Article, provided:

(1) At least one listed qualified individual shall be regularly employed by the applicant at each separate place of business to have the specific duty and authority to supervise and direct electrical contracting done by or in the name of the licensee;

(2) An application is filed with the Board which contains a statement of ownership, states the names and official positions of all employees who are listed qualified individuals and provides such other information as the Board may reasonably require;

(3) The applicant, through an authorized officer or owner, shall agree in writing to report to the Board within five days any additions to or loss of the employment of listed qualified individuals; and

(4) The applicant furnishes, upon the initial application for a license, a bonding ability statement completed by a bonding company licensed to do business in North Carolina, verifying the applicant's ability to furnish performance bonds for electrical contracting projects having a value in excess of twenty-five thousand dollars ($25,000) for the intermediate license classification and in excess of seventy-five thousand dollars ($75,000) for the unlimited license classification. In lieu of furnishing the bonding ability statement, the applicant may submit for evaluation and specific approval of the Board other information certifying the adequacy of the applicant's financial ability to engage in projects of the license classification applied for. The bonding ability statement or other financial information must be submitted in the same name as the license to be issued. If the firm for which a license application is filed is owned by a sole proprietor, the bonding ability statement or other financial information may be furnished in either the firm name or the name of the proprietor. However, if the application is submitted in the name of a sole proprietor, the applicant shall submit information verifying that the person in whose name the application is made is in fact the sole proprietor of the firm.

(5) Repealed by Session Laws 1989, c. 709, s. 5, effective August 1, 1989.

(b) A license shall indicate the names and classifications of all listed qualified individuals employed by the applicant. A license shall be cancelled if at any time no listed qualified individual is regularly employed by the applicant; provided, that work begun prior to such cancellation may be completed under such conditions as the Board shall direct; and provided further that no work for which a license is required under this Article may be bid for, contracted for or initiated subsequent to such cancellation until said license is reinstated by the Board. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1; 1989, c. 709, s. 5; 1995, c. 509, s. 135.2(e).)

Effect of Amendments. — The 1995 amendment, effective July 1, 1995, substituted "twenty-five thousand dollars ($25,000)" for "seventeen thousand five hundred dollars ($17,500)" in subdivision (a)(4).

§ 87-43.3. Classification of licenses.

An electrical contracting license shall be issued in one of the following classifications: Limited, under which a licensee shall be permitted to engage in a single electrical contracting project of a value not in excess of twenty-five thousand dollars ($25,000) and on

which the equipment or installation in the contract is rated at not more than 600 volts; Intermediate, under which a licensee shall be permitted to engage in a single electrical contracting project of a value not in excess of seventy-five thousand dollars ($75,000); Unlimited, under which a licensee shall be permitted to engage in any electrical contracting project regardless of value; and such other special Restricted classifications as the Board may establish from time to time to provide, (i) for the licensing of persons, partnerships, firms or corporations wishing to engage in special restricted electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature, and (ii) for the licensing of persons, partnerships, firms or corporations wishing to engage in electrical contracting work as an incidental part of their primary business, which is a lawful business other than electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature directly in connection with said primary business. The Board may establish appropriate standards for each classification, such standards not to be inconsistent with the provisions of G.S. 87-42. (1969, c. 669, s. 1; 1973, c. 1228, s. 1; 1975, c. 29; 1989, c. 709, s. 6; 1995, c. 114, s. 6.)

Effect of Amendments. — The 1995 amendment, effective July 1, 1995, and applicable to electrical contracting projects commenced on or after that date, substituted "twenty-five thousand dollars ($25,000)" for "seventeen thousand five hundred dollars ($17,500)" near the beginning of the first sentence.

§ 87-43.4. Residential dwelling license.

There is hereby created a separate license for electrical contractors which shall permit an electrical contractor to engage in electrical contracting projects pertaining to single-family detached residential dwellings. The value of a single project pertaining to a single-family detached residential dwelling shall not be in excess of the maximum value, established in G.S. 87-43.3, of a single project engaged in by a licensee with a license classified as limited. The Board shall establish appropriate standards for this new license. The standards of knowledge, experience and proficiency shall be those appropriate for that license. (1973, c. 1343; 1995, c. 114, s. 3.)

Effect of Amendments. — The 1995 amendment, effective July 1, 1995, and applicable to electrical contracting projects commenced on or after that date, added the second sentence.

§ 87-47. Penalties imposed by Board; enforcement procedures.

(a) Repealed by Session Laws 1989, c. 709, s. 9.

(a1) The following activities are prohibited:

(1) Offering to engage or engaging in electrical contracting without being licensed.

(2) Selling, transferring, or assigning a license, regardless of whether for a fee.

(3) Aiding or abetting an unlicensed person, partnership, firm, or corporation to offer to engage or to engage in electrical contracting.

(4) Being convicted of a crime involving fraud or moral turpitude.
(5) Engaging in fraud or misrepresentation to obtain a certification, obtain or renew a license, or practice electrical contracting.
(6) Engaging in false or misleading advertising.
(7) Engaging in malpractice, unethical conduct, fraud, deceit, gross negligence, gross incompetence, or gross misconduct in the practice of electrical contracting.

(a2) The Board may administer one or more of the following penalties if the applicant, licensee, or qualified individual has engaged in any activity prohibited under subsection (a1) of this section:

(1) Reprimand.
(2) Suspension from practice for a period not to exceed 12 months.
(3) Revocation of the right to serve as a listed qualified individual on any license issued by the Board.
(4) Revocation of license.
(5) Probationary revocation of license or the right to serve as a listed qualified individual on any license issued by the Board, upon conditions set by the Board as the case warrants, and revocation upon failure to comply with the conditions.
(6) Revocation of certification.
(7) Refusal to certify an applicant or a qualified individual.
(8) Refusal to issue a license to an applicant.
(9) Refusal to renew a license.

(a3) In addition to administering a penalty under subsection (a2) of this section, the Board may assess a civil penalty of not more than one thousand dollars ($1,000) against a licensee or a qualified individual who has engaged in an activity prohibited under subsection (a1) of this section or has violated another provision of this Article or a rule adopted by the Board. Civil penalties collected under this subsection shall be deposited in the General Fund of North Carolina as nontax revenue.

In determining the amount of a civil penalty, the Board shall consider:

(1) The degree and extent of harm to the public safety or to property, or the potential for harm.
(2) The duration and gravity of the violation.
(3) Whether the violation was committed willfully or intentionally, or reflects a continuing pattern.
(4) Whether the violation involved elements of fraud or deception either to the public or to the Board, or both.
(5) The violator's prior disciplinary record with the Board.
(6) Whether and the extent to which the violator profited by the violation.

(a4) Any person, including the Board and its staff on their own initiative, may prefer charges pursuant to this section, and such charges must be submitted in writing to the Board. The Board may, without a hearing, dismiss charges as unfounded or trivial. The Board may issue a notice of violation based on the charges, to be served by a member of the Board's staff or in accordance with Rule 4 of the Rules of Civil Procedure, against any person, partnership, firm, or corporation for engaging in an activity prohibited under

subsection (a1) of this section or for a violation of the provisions of this Article or any rule adopted by the Board. The person or other entity to whom the notice of violation is issued may request a hearing by notifying the Board in writing within 20 days after being served with the notice of violation. Hearings shall be conducted by the Board or an administrative law judge pursuant to Article 3A of Chapter 150B of the General Statutes. In conducting hearings, the Board may remove the hearings to any county in which the offense, or any part thereof, was committed if in the opinion of the Board the ends of justice or the convenience of witnesses require such removal.

(a5) If the person or other entity does not request a hearing under subsection (a4) of this section, the Board shall enter a final decision and may impose penalties against the person or other entity. If the person or other entity is not a licensee or a qualified individual, the Board may impose penalties under subsection (a2) of this section. If the person or other entity is a licensee or a qualified individual, the Board may impose penalties under subsection (a2) of this section, subsection (a3) of this section, or both.

(b) The Board shall adopt and publish rules, in accordance with Chapter 150B of the General Statutes and consistent with the provisions of this Article, governing the matters contained in this section.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding charges and notices of violation pursuant to this section. This record shall include, for each person, partnership, firm, and corporation charged or notified of a violation, the date and nature of each charge or notice of violation, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter.

(d) The Board may reinstate a qualified individual's certification and may reinstate a license after having revoked it, provided that one year has elapsed from revocation until reinstatement and that the vote of the Board for reinstatement is by a majority of its members.

The Board shall immediately notify the Secretary of State and the electrical inspectors within the licensee's county of residence upon the revocation of a license or the reissuance of a license which had been revoked.

(e) In any case in which the Board is entitled to convene a hearing to consider imposing any penalty provided for in subsection (a2) or (a3) of this section, the Board may accept an offer in compromise of the charge, whereby the accused shall pay to the Board a penalty of not more than one thousand dollars ($1,000). Penalties collected by the Board under this subsection shall be deposited in the General Fund of North Carolina as nontax revenue. (1969, c. 669, s. 1; 1973, c. 1331, s. 3; 1979, c. 904, s. 11; 1989, c. 709, s. 9; 1995, c. 114, s. 4.)

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, rewrote this section.

CASE NOTES

Hearings on Charges Required. — Though the language is not explicit in requiring that the Board of Examiners of Electrical Contractors hold a hearing on charges, such a requirement is implicit both in the language referring to "hear-

ings of charges" and in the stated purpose of the statute governing the jurisdiction of the Board to hear such charges. Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994).

It would be contrary to the intent expressed in subsection (a1), that of protecting the public, to determine that plaintiff was not entitled to a hearing and decision on charges brought to effectuate that very purpose. Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994).

ARTICLE 5.

Refrigeration Contractors.

§ 87-52. State Board of Refrigeration Examiners; appointment; term of office.

For the purpose of carrying out the provisions of this Article, the State Board of Refrigeration Examiners is created, consisting of seven members appointed by the Governor to serve seven-year staggered terms. The Board shall consist of one member who is a wholesaler or a manufacturer of refrigeration equipment; one member from an engineering school of The University of North Carolina, one member from the Division of Public Health of The University of North Carolina, two licensed refrigeration contractors, one member who has no ties with the construction industry to represent the interest of the public at large, and one member with an engineering background in refrigeration. The term of office of one member shall expire each year. Vacancies occurring during a term shall be filled by appointment of the Governor for the unexpired term. Whenever the term "Board" is used in this Article, it means the State Board of Refrigeration Examiners. No Board member shall serve more than one complete consecutive term. (1955, c. 912, s. 1; 1959, c. 1206, s. 2; 1973, c. 476, s. 128; 1979, c. 712, s. 1; 1995, c. 376, s. 1.)

Editor's Note. — Session Laws 1995, c. 376, s. 5, provides: "The term of the public member of the Board that is currently scheduled to expire first shall expire on October 1, 1995, and the initial member with the engineering background in refrigeration appointed pursuant to this act shall serve from the date of appointment to January 1, 2001."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in the second sentence deleted "Greater" preceding both occurrences of "University", substituted "one member who has" for "and two members who have", and added "and one member with an engineering background in refrigeration."

§ 87-58. Definitions; contractors licensed by Board; examinations.

(a) As applied in this Article, "refrigeration trade or business" is defined to include all persons, firms or corporations engaged in the installation, maintenance, servicing and repairing of refrigerating machinery, equipment, devices and components relating thereto and within limits as set forth in the codes, laws and regulations governing refrigeration installation, maintenance, service and repairs within the State of North Carolina or any of its political subdivisions, provided however, that this Article shall not apply to the replacement of lamps and fuses and to the installation and servicing of domestic household refrigerators and freezers or domes-

tic ice-making appliances connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed, and provided, further, that the provisions of this Article shall not repeal any wording, phrase, or paragraph as set forth in North Carolina General Statutes, Chapter 87, Article 2; and provided, further, that this Article shall not apply to employees of persons, firms, or corporations or persons, firms or corporations, not engaged in refrigeration contracting as herein defined, that install, maintain and service their own refrigerating machinery, equipment and devices. The provisions of this Article shall not apply to any person, firm or corporation engaged in the business of selling, repairing and installing any air-conditioning units, devices or systems for the purpose of cooling offices, buildings, houses, works, manufacturing plants, or any machinery, manufactured article or processing of material.

(b) The term "refrigeration contractor" means a person, firm or corporation engaged in the business of refrigeration contracting.

(b1) The term "transport refrigeration contractor" means a person, firm, or corporation engaged in the business of installation, maintenance, servicing, and repairing of transport refrigeration.

(c) Any person, firm or corporation who for valuable consideration engages in the refrigeration business or trade as herein defined shall be deemed and held to be in the business of refrigeration contracting.

(d) In order to protect the public health, comfort and safety, the Board shall prescribe the standard of experience to be required of an applicant for license and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating cost, fundamentals of installation and design as they pertain to refrigeration; and as a result of the examination, the Board shall issue a certificate of license in refrigeration to applicants who pass the required examination and a license shall be obtained in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in the business of refrigeration contracting. The Board shall prescribe standards for and issue licenses for refrigeration contracting and for transport refrigeration contracting. A transport refrigeration contractor license is a specialty license that authorizes the licensee to engage only in transport refrigeration contracting. A refrigeration contractor licensee is authorized to engage in transport refrigeration and all other aspects of refrigeration contracting.

Each application for examination shall be accompanied by a check, post-office money order or cash in the amount of the annual license fee required by this Article. Regular examinations shall be given in the months of April and October of each year and additional examinations may be given at times the Board deems wise and necessary. Any person may demand in writing a special examination and upon payment by the applicant of the cost of holding the examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for the examination. A person who fails to pass any examination shall not be reexamined until the next regular examination.

(e) Repealed by Session Laws 1979, c. 843, s. 1.

(f) Licenses Granted without an Examination. — Persons who had an established place of business prior to July 1, 1979, and who

produce satisfactory evidence that they are engaged in the refrigeration business as herein defined in any city, town or other area in which Article 5 of Chapter 87 of the General Statutes did not previously apply shall be granted a certificate of license, without examination, upon application to the Board and payment of the license fee, provided completed applications shall be made prior to June 30, 1981.

(g) The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities.

(h) A transport refrigeration contractor having an established place of business doing transport refrigeration contracting prior to October 1, 1995, shall be granted a transport refrigeration contracting specialty license, without examination, if the person produces satisfactory evidence the person is engaged in transport refrigeration contracting, pays the required license fee, and applies to the Board prior to January 1, 1997. The current specialty license shall be posted in accordance with subsection (g) of this section.

(i) Nothing in this Article shall relieve the holder of a license issued under this section from complying with the building or electrical codes, statutes, or ordinances of the State or of any county or municipality or from responsibility or liability for negligent acts in connection with refrigeration contracting work. The Board shall not be liable in damages, or otherwise, for the negligent acts of licensees. (1955, c. 912, s. 7; 1959, c. 1206, s. 1; 1979, c. 843, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1082, s. 5; 1989, c. 770, s. 13; 1995, c. 376, s. 2.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in the first proviso of the first sentence of subsection (a) substituted "domestic household refrigerators and freezers or domestic ice-making appliances" for "appliances and equipment", and deleted "'or devices using gas as a fuel, or ice using or storing equipment'" following "have been permanently installed"; in subsection (b) substituted "term" for "phrase", and "means" for "is hereby defined to be"; added subsection (b1); in subsection (d) deleted "as herein defined" from the end of the first sentence, added the second, third and fourth sentences, and substituted "times the Board deems" for "such other times as the Board may deem"; added subsections (h) and (i); and made stylistic changes.

§ 87-59. Revocation or suspension of license for cause.

(a) The Board shall have power to revoke or suspend the license of any refrigeration contractor who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this Article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a refrigeration contractor as defined in this Article. Any person may prefer charges of fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, against any refrigeration contractor who is licensed under the provisions of this Article. All charges shall be in writing and verified by the complainant, and shall be heard and determined by the Board in accordance with the provisions of Chapter 150B of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings of the Board, and the disposition of the matter.

(d) In a case in which the Board is entitled to convene a hearing to consider a charge under this section, the Board may accept an offer to compromise the charge, whereby the accused shall pay to the Board a penalty not to exceed one thousand dollars ($1,000). The funds derived from the penalty shall be deposited into the General Fund.

(e) All records, papers, and other documents containing information collected and compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes. (1955, c. 912, s. 8; 1973, c. 1331, s. 3; 1979, c. 712, s. 3; 1989, c. 770, s. 14; 1995, c. 376, s. 3.)

Editor's Note. — Session Laws 1995, c. 376, s. 5, provides: "G.S. 87-59(d), as enacted by this act, applies to hearings convened on or after the effective date [October 1, 1995]."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added subsections (d) and (e), and made stylistic changes.

§ 87-61. Violations made misdemeanor; employees of licensees excepted.

Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of refrigeration contracting as defined in this Article, without first having been licensed to engage in the business, or businesses, as required by the provisions of this Article; or any person, firm or corporation holding a refrigeration license under the provisions of this Article who shall practice or offer to practice or carry on any type of refrigeration contracting not authorized by the license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this Article, shall be guilty of a Class 2 misdemeanor. The Board may, in its discretion, use its funds to defray the costs and expenses, legal or otherwise, in the prosecution of any violation of this Article. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of this Article, shall not be construed to have engaged in the business of refrigeration contracting. (1955, c. 912, s. 10; 1993, c. 539, s. 607; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 376, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the second sentence, and made stylistic changes.

ARTICLE 7.

North Carolina Well Construction Act.

§ 87-94. Civil penalties.

(a) Any person who violates any provision of this Article, or any order issued pursuant thereto, or any rule adopted thereunder, shall be subject to a civil penalty of not more than one hundred dollars ($100.00) for each violation, as determined by the Secretary of Environment, Health, and Natural Resources. Each day of a continuing violation shall be considered a separate offense. No person shall be subject to a penalty who did not directly commit the violation or cause it to be committed.

(b) No penalty shall be assessed until the person alleged to be in violation has been:

(1) Notified of the violation in accordance with the notice provisions set out in G.S. 87-91(a),

(2) Informed by said notice of remedial action, which if taken within 30 days from receipt of the notice, will effect compliance with this Article and the regulations under it, and

(3) Warned by said notice that a civil penalty can be assessed for failure to comply within the specified time.

(c) In determining the amount of the penalty the Secretary shall consider factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143-215.6 and G.S. 143B-282.1 shall apply to civil penalties assessed under this section.

(d) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail, or by any means authorized by G.S. 1A-1, Rule 4.

(e) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment or requests remission of the assessment in whole or in part. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the Superior Court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment.

(f) Repealed by 1995 (Reg. Sess., 1996), c. 743, s. 2, effective July 1, 1996. (1967, c. 1157, s. 12; 1985, c. 728, s. 3; 1987, c. 246, s. 2; 1989, c. 727, s. 218(22); 1989 (Reg. Sess., 1990), c. 1036, s. 10; 1995 (Reg. Sess., 1996), c. 743, s. 2.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective July 1, 1996, repealed subsection (f), regarding delegation of powers and duties by the Secretary of Environment, Health, and Natural Resources.

Article 8.

Underground Damage Prevention.

§ 87-102. Notice required prior to excavation.

CASE NOTES

Stated in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-106. Exceptions.

CASE NOTES

Applied in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-107. Duties of the utility owners.

CASE NOTES

Cost of Locating Underground Utilities. — So long as the excavating utility provides notice in conformance with this chapter, the locating utility cannot charge the excavating utility for locating its underground cables when the location of such lines is necessary to assure the excavating utility's maintenance of service to customers, even when the locating is required to be done outside of normal business hours. Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

§ 87-108. Absence of utility location.

CASE NOTES

Stated in Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 468 S.E.2d 66 (1996).

Chapter 88.

Cosmetic Art.

Sec.
88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.
88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

(a) No person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners. The practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment, unless the practice is allowed under G.S. 88-7.1 or occurs in a barbershop licensed under Chapter 86A of the General Statutes. A person who practices cosmetic art in a barbershop must comply with G.S. 86A-15.

(b) The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Guilford, Mecklenburg, Onslow, Richmond, Sampson.

(c) On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. As a part of the application, the person, firm, or corporation shall list all registered cosmetologists who will practice cosmetic art in that cosmetic art shop and shall identify each cosmetologist as an employee or a booth renter. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars ($25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

(d) All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars ($3.00) per active booth in said shop.

(e) All permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. As a part of the renewal of the permit, the person, firm, or corporation shall list all registered cosmetologists who currently practice cosmetic art in that cosmetic art shop and shall identify each cosmetologist as an employee or a booth renter. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833; 1987 (Reg. Sess., 1988), c. 965; 1993, c. 22, s. 2; c. 54, s. 1; 1995 (Reg. Sess., 1996), c. 605, s. 15.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, in subsection (a), substituted "No" for "On and after June 30, 1933, no", substituted "Examiners. The" for "Examiners hereinafter established and, except as provided in G.S. 88-7.1, the", added "unless the practice is allowed under G.S. 88-7.1 or occurs in a barbershop licensed under Chapter 86A of the General Statutes" in the next to last sentence, and added the last sentence.

§ 88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.

(a)(1) The State Board of Cosmetic Art Examiners may adopt a reasonable curriculum and rules for recognized schools and colleges of beauty culture and may adopt reasonable rules for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have the curriculum and rules and the sanitary rules enforced. The Board may not require a shop to be separated from a building or room used for the purpose of providing barber services. The duly authorized agents of the Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the curriculum and rules and the sanitary rules shall be furnished from the office of the Board or by an agent of the Board to the owner or manager of each shop or school. The copy shall be kept posted in a conspicuous place in each shop and school, and a copy of the curriculum and rules for schools shall be kept posted in a conspicuous place in each school. Each shop and school shall comply with the rules.

(2) The Board shall adopt regulations prohibiting the use of commercial chemicals of unknown content by persons reg-

istered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public.

(3) The Board shall adopt regulations instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(b) The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9; 1981, c. 614, s. 1; c. 615, s. 14; 1995 (Reg. Sess., 1996), c. 605, s. 16.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, in subdivision (a)(1), in the first sentence, substituted "may adopt" for "shall have the authority to make", substituted "may adopt reasonable rules" for "make reasonable rules and regulations", and substituted "the curriculum and rules and the sanitary rules enforced" for "such curriculum and rules and the sanitary rules and regulations enforced"; inserted the present second sentence; substituted "the" for "said" preceding "Board" in the present third sentence; in the present fourth and fifth sentences, deleted "and regulations" following "sanitary rules", substituted "an agent of the Board" for "the above mentioned authorized agents" following "the Board or by", substituted "school. The" for "school in the State, and such" following "manager of each shop or", deleted "recognized" following "rules for", deleted "and colleges of beauty culture" following "schools", and deleted "and the rules and regulations complied with as required by this Chapter" following "place in each school"; and added the last sentence.

Chapter 88A.

Electrolysis Practice Act.

Sec.
88A-5. Creation and membership of Board.
Sec.
88A-23. Reports and immunity from suit.

§ 88A-5. Creation and membership of Board.

(a) The North Carolina Board of Electrolysis Examiners is created. The Board shall consist of five members as follows:

(1) Three electrologists who have engaged in the practice of electrolysis for at least five years, one of whom shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one of whom shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and one of whom shall be appointed by the Governor.

(2) A physician licensed under Chapter 90 of the General Statutes, who shall be nominated by the North Carolina Medical Board and appointed by the Governor.

(3) A public member, appointed by the Governor, who has not practiced electrolysis, who is not in training to become an electrologist, and who is not related to anyone who would be prohibited by this subdivision from serving on the Board as a public member.

(b) Legislative appointments shall be made in accordance with G.S. 120-121. A vacancy in a legislative appointment shall be filled in accordance with G.S. 120-122.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is appointed. Of the members initially appointed, one of the electrologist members shall serve a term of one year. The public member and the second electrologist member shall serve a term of two years. The physician member and the third electrologist member shall serve a term of three years. The terms of all initial appointments shall commence within 30 days of the effective date of this act. No member may serve more than two consecutive full terms.

(d) Vacancies shall be filled by the appropriate appointing authority within 30 days after the position is vacated. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(e) The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from all Board business until the charges are resolved. The Governor may also remove any member of the Board which he appoints.

(f) Each member of the Board shall receive per diem compensation and reimbursement for travel and subsistence in the amounts the Board votes upon and records in its minutes, provided the amounts do not exceed the amounts specified in G.S. 93B-5.

(g) The Board shall elect a Chairman, a Vice-Chairman, a Treasurer, and such other officers as are deemed necessary by the Board.

All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(h) The Board shall hold at least two meetings each year to conduct its business, and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the members shall constitute a quorum. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1995, c. 94, s. 6.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "North Carolina Board of Medical Examiners" in subdivision [(a)] (2).

§ 88A-23. Reports and immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a licensee, or who has reasonable cause to suspect that any person is in violation of this Chapter, shall report the relevant facts to the Board. Upon the receipt of such charge, or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1989 (Reg. Sess., 1990), c. 1033, s. 1; 1995, c. 509, s. 36.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "own" for "on" in the second sentence.

Chapter 89A.

Landscape Architects.

Sec.
89A-8. Violation a misdemeanor; injunction to prevent violation.

§ 89A-1. Definitions.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

(a) It shall be a Class 1 misdemeanor for any person to use, or to hold himself out as entitled to practice under, the title of landscape architect or landscape architecture unless he is duly registered under the provisions of this Chapter.

(b) The Board may appear in its own name in the courts of the State and apply for injunctions to prevent violations of this Chapter. (1969, c. 672, s. 8; 1973, c. 1331, s. 3; 1987, c. 827, s. 72; 1993, c. 539, s. 610; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 610, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 89C.

Editor's Note. — The legislation and annotations affecting Chapter 89C have been included in a recently published replacement chapter.

Chapter 89D.

Landscape Contractors.

Sec.
89D-5. Application for certificate; examination; renewal.
89D-7. Denial, revocation or suspension of certificate.

§ 89D-5. Application for certificate; examination; renewal.

(a) Any person, partnership, association or corporation hereinafter desiring to register and be titled as a landscape contractor shall make written application for a certificate of title to the Board on such forms as are prescribed by the Board. Each applicant for a certificate of title as a landscape contractor shall be at least 18 years of age. Prior to July 1, 1976, each applicant for a certificate shall have been actively engaged as an untitled landscape contractor for at least one year prior to date of application. After July 1, 1976, an applicant shall furnish evidence satisfactory to the Board of three years' experience in landscape contracting or the completion of a study or combination of study and experience in landscape contracting equivalent to three years' experience under a landscape contractor.

(b) Any person who applies to the Board to be registered and titled as a landscape contractor shall be required to take an oral or written examination to determine his qualifications. Each application for registration by examination shall be accompanied by an application fee of fifty dollars ($50.00).

The Board shall compile a manual from which the examination will be prepared. The examination fee shall not exceed seventy-five dollars ($75.00). Any one failing to pass an examination may be reexamined upon payment of the same fee as that charged to persons taking the examination for the first time, in accordance with such rules as the Board may adopt pertaining to examinations and reexaminations.

If the results of the examination are satisfactory, the Board shall issue the applicant a certificate authorizing him to be titled as a landscape contractor in the State of North Carolina upon payment of the initial certification fee as outlined in subsection (c).

(c) All certificates granted and issued by the Board under the provisions of this Chapter shall expire annually on December 31. Renewal of such certificates may be effected at any time during the month preceding the expiration date of such certificates upon proper application to the Board accompanied by the payment to the secretary-treasurer of the Board of a renewal fee, as set by the Board, of not more than fifty dollars ($50.00). The fee for an initial certificate shall be the same as for a renewal certificate and is in addition to the application fee. All certificates reinstated after expiration date thereof shall be subject to a late filing fee of ten dollars ($10.00). In the event a registrant fails to obtain a reinstatement of such certificate within 12 months from the date of expiration thereof, the Board may, in its discretion, consider such registrant subject to the provisions of this Chapter relating to the

issuance of an original certificate. Duplicate certificates may be issued by the Board upon payment of a fee of one dollar ($1.00) by the registrant. (1975, c. 741, s. 5; 1983, c. 108, ss. 2, 3; 1991, c. 180, s. 1.)

§ 89D-7. Denial, revocation or suspension of certificate.

(a) The Board shall have power to revoke or suspend certificates of title herein provided. The Board may upon its own motion or upon a verified complaint in writing hold a hearing as hereinafter provided to investigate the actions of any titled landscape contractor. The Board shall have the power to suspend or revoke any certificate of title issued under the provisions of this Chapter if the registrant has by false or fraudulent representations obtained a certificate; if the registrant has been convicted or has entered a plea of nolo contendere to any crime involving moral turpitude in any court, State or federal; if the registrant is found to have committed any act which constitutes improper, fraudulent or dishonest dealing; or if the registrant violates any rule or regulation duly promulgated by the Board.

(b) Chapter 150B of the General Statutes applies to proceedings under this section to deny, revoke, or suspend a certificate. (1975, c. 741, s. 7; 1987, c. 827, s. 74.)

Chapter 89E.

Geologists Licensing Act.

Sec.
89E-3. Definitions.
89E-22. Misdemeanor.

§ 89E-1. Short title.

Cross References. — As to limited liability companies and their powers, see § 57C-2-01 et seq.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 89E-3. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Board" means the North Carolina Board for Licensing of Geologists.

(2) "Geologist". The term "geologist", within the intent of this Chapter, shall mean a person who is trained and educated in the science of geology.

(3) The term "geologist-in-training" means a person who has taken and successfully passed the portion of professional examination covering fundamental or academic geologic subjects, prior to his completion of the requisite years of experience in geologic work as provided for in this Chapter.

(4) "Geology" means the science dealing with the earth and its history; investigation, prediction and location of the materials and structures which compose it; the natural processes that cause change in the earth; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases and other materials for the benefit of mankind. This definition shall not include any of the following:

a. Service or creative works, the adequate performance of which requires engineering education, training, and experience.

b. The assessment of an underground storage tank required by applicable rules at closure or change in service unless there has been a discharge or release of the product from the tank.

(5) The term "good moral character" means such character as tends to ensure the faithful discharge of the fiduciary duties of the licensed geologist to his client.

(6) "License" means a certificate issued by the Board recognizing the individual named in this certificate as meeting the requirements for licensing under this Chapter.

(7) "Licensed geologist" means a person who is licensed as a geologist under the provisions of this Chapter.

(8) "Public practice of geology" means the performance for others of geological service or work in the nature of work or consultation, investigation, surveys, evaluations, planning, mapping and inspection of geological work, in which the performance is related to the public welfare of safeguarding

of life, health, property and the environment, except as specifically exempted by this Chapter. The definition shall not include or allow the practice of engineering as defined in Chapter 89C of the North Carolina General Statutes.

(9) The term "qualified geologist" means a person who possesses all of the qualifications specified in this Chapter for licensing except that he or she is not licensed.

(10) The term "responsible charge of work" means the independent control and direction by the use of initiative, skill and independent judgment of geological work or the supervision of such work.

(11) The term "subordinate" means any person who assists a licensed geologist in the practice of geology without assuming the responsible charge of work. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(j).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, in subdivision (4), substituted "of the following" for "service" at the end of the introductory language, added the subdivision (4)a. designation, added "Service" at the beginning of subdivision (4)a., and added subdivision (4)b.

§ 89E-18. Prohibitions; unlawful acts.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 89E-22. Misdemeanor.

Any person who shall willfully practice publicly, or offer to practice publicly, geology for other natural or corporate persons in this State without being licensed in accordance with the provisions of this Chapter, or any person presenting or attempting to use as his own the license or the seal of another, or any person who shall give any false or forged evidence of any kind in obtaining a license, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked license or practice at any time during a period the Board has suspended or revoked the license, or any person who shall violate the provisions of this Chapter shall be guilty of a Class 2 misdemeanor. (1983 (Reg. Sess., 1984), c. 1074, s. 1; 1993, c. 539, s. 613; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 613, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1996

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina